Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 08-165
Petition for Declaratory Ruling to Clarify	)	
Provisions of Section 332(c)(7)(B) to Ensure	)	
Timely Siting Review and to Preempt under	)	
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals as	)	
Requiring a Variance	)	
	)	

COMMENTS OF THE CITY OF
ALBUQUERQUE, NEW MEXICO

These Comments are filed by the City of Albuquerque, New Mexico to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The City of Albuquerque, New Mexico also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government's action or failure to act that is inconsistent with clause 332(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

There has been no showing of a problem with cell tower zoning. And, it should be emphasized, zoning is a matter of local concern in which the specifics of the locality must be considered by the local government. The deadlines do not take into account the need to consider the specifics of the permit request, the local property conditions and the need for public notice and hearings. When an application is incomplete, without necessary information, it takes an even longer period of time to make an informed decision.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in the City of Albuquerque, New Mexico.

1. LEGAL REQUIREMENTS FOR FACILITY SITING

The City of Albuquerque, New Mexico has a specific ordinance within its Zoning Code which addresses wireless facility siting. The ordinance was enacted in 1999 but has been amended three times since then, including a major rewrite that was adopted on January 7, 2008 by the City Council following over a year of discussion and work by a City Council sponsored task force including wireless telecommunications industry representatives, neighborhood and City representatives. The Ordinance calls for concealment unless the facility is being collocated, establishes setback requirements and establishes standards for a concealed facility to be aesthetically integrated with existing buildings, structures and landscaping to blend in with the nature and character of the environment. The applicant must provide notice to property owners. Additionally, the Ordinance calls for a review time not to exceed sixty days for a complete application. There may be delays when the applicant fails to submit a complete application.

2. NUMBER OF APPLICATIONS AND OUTCOMES

In 2008, the City's Development Review Division which reviews applications for concealed facilities in designated zones has had 12 applications for approval of wireless telecommunications facilities, thus far. Of these, five (5) applications were for collocations on existing facilities, and seven (7) were for new towers. In 2007 there were 21 applications, eleven (11) for collocations and ten (10) for new towers. In 2006 there were 47 applications with an estimated 50/50 split between new towers and collocations. The Code Enforcement Division which reviews applications for nonconcealed collocations on straight zoned sites have reviewed a very limited number of applications which have not been broken out from other commercial plan applications.

The average time between filing of an application and a final decision by the City's Environmental Planning Commission has been twelve (12) weeks. This time may be extended when the applicant seeks a deferral to resolve outstanding issues. Based on 2007 data, collocations take an average of two (2) months. Because they are more controversial, free-standing towers take an average of five (5) months.

3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties

experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

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